83-815

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN H. GRIMM, M.D., PAT McBRIDE,
FRANK T. NAGLE, TRUSTEE, AND THE TAYLOR TRUST,
PETITIONERS

V.

FRED RIZK, EDWARD RIZK,
CARL GROMATZKY, AND FRANK F. DAVIS,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES
FROM THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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COUNSEL OF RECORD FOR PETITIONERS

QUESTIONS FOR REVIEW

1. WHETHER PETITIONERS' PROPERTY RIGHTS WERE UNLAWFULLY USURPED BY THE COURTS OF TEXAS WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES; AND

2. WHETHER TEX. REV. CIV. STAT. ANN. ART. 3810, AS INTERPRETED AND IMPLEMENTED BY THE SUPREME COURT OF TEXAS, IS REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE OF THE TAKING IN THIS CAUSE OF PROPERTY WITHOUT DUE PROCESS OF LAW.

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NO. _____

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES
FROM THE SUPREME COURT OF TEXAS

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

JOHN H. GRIMM, PAT McBRIDE, FRANK T. NAGLE AND THE TAYLOR TRUST, PETITIONERS, PRAY THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE FINAL JUDGMENT OF THE SUPREME COURT OF TEXAS ENTERED IN THE ABOVE STYLED CAUSE ON JULY 20, 1983.

OPINIONS BELOW

The unreported opinion of the District Court of Harris County, Texas, 151st Judicial District (the "trial court"), cause number 1,134,965, is printed in Appendix "A" attached hereto at page 1. The opinion of the Court of Appeals for the 14th Supreme Judicial District of Texas, cause number A-2982, reported at 640 S.W.2d 711 (Tex. Civ. App. - Houston [14th Dist.] 1982, writ ref'd n.r.e.), is printed in Appendix "A" at page 9. The unreported letter from the Supreme Court of Texas notifying Petitioners that Petitioners' Application for Writ of Error, cause number C-1626, was refused with the notation of no reversible error is printed in Appendix "A" at page 30. The unreported letter from the Supreme Court of Texas notifying Petitioners that Petitioners' Motion for Rehearing in said cause was overruled is printed in Appendix "A" at page 31. The unreported opinion of the District Court of Harris County, Texas, 129th Judicial District, cause number 1,108,668, the same being the opinion which forms the basis for the holding of <u>res judicata</u> in the foregoing opinions, is printed in Appendix "A" at page 32.

JURISDICTION

THE HOLDING OF THE SUPREME COURT OF TEXAS REFUSING PETITIONERS' APPLICATION FOR WRIT OF ERROR (APPENDIX "A", INFRA AT PAGE 30) WAS ENTERED ON JUNE 15, 1983. A TIMELY MOTION FOR RE-HEARING WAS OVERRULED ON JULY 20, 1983. (APPENDIX "A", INFRA AT PAGE 31). THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED UNDER 28 U.S.C. §1257(3) WHICH STATES THAT:

> FINAL JUDGMENTS OR DECREES RENDERED BY THE HIGHEST COURT OF A STATE IN WHICH A DECISION COULD BE HAD, MAY BE REVIEWED BY THE SUPREME COURT...BY WRIT OF CERTIORARI, WHERE THE VALIDITY OF A TREATY OR STATUTE OF THE UNITED STATES IS DRAWN IN QUESTION OR WHERE THE VALIDITY OF A STATE STATUTE IS DRAWN IN QUESTION ON THE GROUND OF ITS BEING REPUGNANT TO THE CONSTITUTION, TREATIES OR LAWS OF THE UNITED STATES, OR WHERE ANY TITLE, RIGHT, PRIVILEGE OR IMMUNITY IS SPECIALLY SET UP OR CLAIMED UNDER THE CONSTITUTION, TREATIES OR STATUTES OF, OR COMMISSION HELD OR AUTHORITY EXERCISED UNDER, THE UNITED STATES.

28 U.S.C. §1257(3) (1977) (EMPHASIS ADDED).

CONSTITUTIONAL AND STATUTORY PROVISIONS

PETITIONERS ASSERT THAT THE DECISIONS OF THE COURTS BELOW HAVE VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS AS FOUND IN THE FOLLOWING:

> NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.

U.S. CONST. AMEND. V (EMPHASIS ADDED).

> ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

U.S. CONST. AMEND. XIV, §1 (EMPHASIS ADDED).

PETITIONERS WOULD SHOW THAT THE FOLLOWING STATUTE, AS INTERPRETED AND IMPLEMENTED BY THE TEXAS SUPREME COURT, HAS DEPRIVED PETITIONERS OF THEIR RIGHT TO DUE PROCESS OF LAW:

> ALL SALES OF REAL ESTATE MADE UNDER POWERS CONFERRED BY ANY DEED OF TRUST OR OTHER CONTRACT LIEN SHALL BE MADE IN THE COUNTY IN WHICH SUCH REAL ESTATE IS SITUATED. WHERE SUCH REAL ESTATE IS SITUATED IN MORE THAN ONE COUNTY THEN NOTICES AS HEREIN PRO-

VIDED SHALL BE GIVEN IN BOTH OR ALL OF SUCH COUNTIES, AND THE REAL ESTATE MAY BE SOLD IN EITHER COUNTY, AND SUCH NOTICE SHALL DESIGNATE THE COUNTY WHERE THE REAL ESTATE WILL BE SOLD. NOTICE OF SUCH PROPOSED SALE SHALL BE GIVEN BY POSTING WRITTEN NOTICE THEREOF AT LEAST 21 DAYS PRECEDING THE DATE OF THE SALE AT THE COURTHOUSE DOOR OF THE COUNTY IN WHICH THE SALE IS TO BE MADE, AND IF THE REAL ESTATE IS IN MORE THAN ONE COUNTY, ONE NOTICE SHALL BE POSTED AT THE COURTHOUSE DOOR OF EACH COUNTY IN WHICH THE REAL ESTATE IS SITUATED.

IN ADDITION, THE HOLDER OF THE DEBT TO WHICH THE POWER IS RELATED SHALL AT LEAST 21 DAYS PRECEDING THE DATE OF SALE SERVE WRITTEN NOTICE OF THE PROPOSED SALE BY CERTIFIED MAIL ON EACH DEBTOR OBLIGATED TO PAY SUCH DEBT ACCORDING TO THE RECORDS OF SUCH HOLDER. SERVICE OF SUCH NOTICE SHALL BE COMPLETED UPON DEPOSIT OF THE NOTICE, ENCLOSED IN A POSTPAID WRAPPER, PROPERLY ADDRESSED TO SUCH DEBTOR AT THE MOST RECENT ADDRESS AS SHOWN BY

THE RECORDS OF THE HOLDER OF THE DEBT, IN A POST OFFICE OR OFFICIAL DEPOSITORY UNDER THE CARE AND CUSTODY OF THE UNITED STATES POSTAL SERVICE. THE AFFIDAVIT OF ANY PERSON HAVING KNOWLEDGE OF THE FACTS TO THE EFFECT THAT SUCH SERVICE WAS COMPLETED SHALL BE PRIMA FACIE EVIDENCE OF THE FACT OF SERVICE. SUCH SALE SHALL BE MADE AT PUBLIC VENDUE BETWEEN THE HOURS OF 10:00 A.M. AND 4:00 P.M. OF THE FIRST TUESDAY IN ANY MONTH.

TEX. REV. CIV. STAT. ANN. ART. 3810 (VERNON 1976)(EMPHASIS ADDED)

STATEMENT OF THE CASE

THE PRESENT ACTION AROSE OUT OF A FORECLOSURE SALE OCCASSIONED BY RESPONDENTS UNDER A DEED OF TRUST TO PROPERTY COMMONLY KNOWN AS THE PLANTATION APARTMENTS IN HOUSTON, HARRIS COUNTY, TEXAS. IN THE TRIAL COURT, PETITIONERS HEREIN ASSERTED THAT THE FORECLOSURE SALE WAS WRONGFUL BECAUSE, AMONG OTHER REASONS, RESPONDENTS FAILED TO COMPLY WITH THE PROPER STATUTORY NOTICE REQUIREMENTS [TEX. REV. CIV. STAT. ANN. ART. 3810 (VERNON1976)] AND THE EXPRESS TERMS UNDER THE DEED OF TRUST REGARDING THE POWER OF

SALE, AND, IN ADDITION, THAT RESPONDENTS HAD WAIVED OR WERE ESTOPPED FROM ASSERTING THEIR RIGHT, IF ANY, TO ACCELERATE THE PROMISSORY NOTES SECURED BY THE DEED OF TRUST.

AFTER EXTENSIVE DISCOVERY PROCEEDINGS BY THE PARTIES, RESPONDENTS MOVED FOR SUMMARY JUDGMENT ON THE PROCEDURAL GROUND OF RES JUDICATA AND/OR COLLATERAL ESTOPPEL AND ALSO UPON THE ALLEGATION OF THE NON-EXISTENCE OF FACTUAL ISSUES. THE PROCEDURAL DEFENSE RESTED UPON A PREVIOUS DETERMINATION OF THE 129TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS (THE "HPCHURCH COURT"), A COPY OF WHICH IS ATTACHED IN APPENDIX "A", INFRA AT PAGE 32, COMMENCED BY WILLIAM HPCHURCH, TRUSTEE ("HPCHURCH") AGAINST THESE SAME RESPONDENTS. ALL GROUNDS RAISED IN RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, PROCEDURAL AND FACTUAL, WERE CONTESTED BY PETITIONERS. PETITIONERS TIMELY FILED AFFIDAVITS AND OTHER SWORN TESTIMONY TO FULLY DISPUTE RESPONDENTS' ALLEGATION OF THE NON-EXISTENCE OF FACTUAL ISSUES. NONETHELESS, THE TRIAL COURT RENDERED SUMMARY JUDGMENT ON SEPTEMBER 28, 1981, AGAINST PETITIONERS.

THOUGH THE SUMMARY JUDGMENT FAILS TO SET FORTH ITS DISPOSITIVE REASONING, IT IS PRESUMED

THAT BECAUSE ALL FACT ISSUES WERE CONTESTED THE SUMMARY JUDGMENT WAS RENDERED ON THE PROCEDURAL GROUND OF RES JUDICATA AND/OR COLLATERAL ESTOPPEL. A COPY OF SAID SUMMARY JUDGMENT IS ATTACHED IN APPENDIX "A", INFRA AT PAGE 1. THEREAFTER, PETITIONERS TIMELY PERFECTED THEIR APPEAL TO THE COURT OF APPEALS FOR THE 14TH SUPREME JUDICIAL DISTRICT OF TEXAS.

POINT OF ERROR NUMBER 5 IN SAID APPEAL STATED:

> THE TRIAL COURT ERRED IN GRANTING APPELLEES' (RESPONDENTS') MOTION FOR SUMMARY JUDGMENT IN THAT APPELLEES FAILED TO PROVE AS A MATTER OF LAW THAT APPELLANTS' (PETITIONERS') CLAIMS WERE BARRED UNDER THE DOCTRINE OF RES JUDICATA.

IN SAID POINT OF ERROR, PETITIONERS MADE REFERENCE TO THE LANGUAGE OF THE UPCHURCH "JUDGMENT" THAT COMPRISES THE BASIS OF PETITIONERS' REASONS FOR GRANTING WRIT, INFRA. THE COURT OF APPEALS AFFIRMED THE TRIAL COURT ON AUGUST 5, 1982. A COPY OF SAID JUDGMENT IS ATTACHED HERETO IN APPENDIX "A", INFRA AT PAGE 9. THE COURT OF APPEALS HELD THAT "THE TRIAL COURT

PROPERLY GRANTED THE APPELLEES' (RESPONDENTS') MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANTS' (PETITIONERS') CLAIMS ARE BARRED BY THE DOCTRINE OF RES JUDICATA." APPENDIX "A" AT PAGE 11. THEREAFTER, PETITIONERS' TIMELY PERFECTED THEIR APPLICATION FOR WRIT OF ERROR TO THE SUPREME COURT OF TEXAS. PETITIONERS' ASSERTED SIX POINTS OF ERROR IN THEIR APPLICATION. POINT OF ERROR NUMBER 1 STATED:

> THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT IN THAT PETITIONERS' CLAIMS ARE NOT BARRED BY THE DOCTRINE OF RES JUDICATA BECAUSE RESPONDENTS FAILED TO PROVE THAT THE UPCHURCH, TRUSTEE, "JUDGMENT" REACHED THE MERITS OF THAT CASE AS A MATTER OF LAW.

ON JUNE 15, 1983, ALL SIX POINTS OF ERROR WERE REFUSED BY THE SUPREME COURT OF TEXAS WITH THE NOTATION OF NO REVERSIBLE ERROR. SEE APPENDIX "A", INFRA AT PAGE 30. IMMEDIATELY THEREAFTER, PETITIONERS TIMELY FILED THEIR MOTION FOR REHEARING. THOUGH THE ARGUMENT HAD BEEN IMPLICITLY FORWARDED BY PETITIONERS FROM THE FIRST DAY OF THIS CAUSE, IT IS HERE THAT

PETITIONERS EXPRESSLY PRESENTED THE PLAIN ERROR OF THE UNCONSTITUTIONAL DEPRIVATION OF PETITIONERS' PROPERTY WITHOUT DUE PROCESS OF LAW THAT WAS BEING OCCASSIONED BY THE COURTS OF TEXAS DUE TO THEIR FAILURE TO CONSTITUTIONALLY INTERPRET AND IMPLEMENT THE PROVISIONS OF TEX. REV. CIV. STAT. ANN. ART. 3810, AND DUE TO THEIR FUNDAMENTAL ERROR IN HOLDING THAT THE PRESENT CASE WAS BARRED BY THE DOCTRINE OF RES JUDICATA. PETITIONERS' MOTION FOR REHEARING WAS OVERRULED BY THE TEXAS SUPREME COURT ON JULY 20, 1983. SEE APPENDIX "A", INFRA AT PAGE 31. PETITIONERS' ARGUMENT IS SET FORTH IN DETAIL BELOW.

REASONS FOR GRANTING WRIT

PETITIONERS WOULD SHOW THAT THERE IS NO LEGAL OR FACTUAL BASIS FOR THE HOLDING THAT THE UPCHURCH "JUDGMENT" IS RES JUDICATA OF PETITIONERS' PRESENT CLAIMS. UPCHURCH BROUGHT SUIT AGAINST RESPONDENTS IN 1977. UPCHURCH WAS ONE OF THE NEGOTIATORS AND AN INTERESTED PARTY IN THE PURCHASE OF THE PLANTATION APARTMENTS FROM RESPONDENTS. THESE SAME RESPONDENTS FILED A MOTION FOR SUMMARY JUDGMENT AGAINST UPCHURCH AND FILED A PROPOSED "JUDGMENT" WHICH WAS GRANTED BY THE UPCHURCH COURT ON MAY ?, 1977. SEE APPENDIX "A", INFRA AT PAGE 32. IT IS THIS

"JUDGMENT" THAT SUPPORTS THE 14TH COURT OF APPEALS AND THE TEXAS SUPREME COURT IN THEIR HOLDING OF RES JUDICATA IN THE PRESENT CAUSE. PETITIONERS WOULD SHOW THAT THE UPCHURCH "JUDGMENT" WAS NOT A FINAL JUDGMENT, AND CAN NOT BE USED UNDER TEXAS LAW TO BAR THE PRESENT ACTION ON THE GROUND OF RES JUDICATA. TO SO HOLD VIOLATES PETITIONERS' RIGHTS TO DUE PROCESS OF LAW TO HAVE THEIR CAUSE OF ACTION DETERMINED ON ITS MERITS.

THE DISPOSITIVE ISSUE PRESENTED HEREIN IS WHETHER THE UPCHURCH "JUDGMENT" IS IN FACT A FINAL JUDGMENT. THOUGH THE DOCUMENT IS ENTITLED "JUDGMENT", IT IS PATENTLY NOT SO ON ITS FACE. THERE ARE TWO KEY HOLDINGS IN THE DOCUMENT WHICH HAVE BEEN MISCONSTRUED OR TOTALLY IGNORED BY THE COURTS BELOW, EACH OF WHICH PROVES BEYOND DOUBT THAT IT IS NOT A FINAL JUDGMENT. THE FIRST PHRASE AS FOUND IN APPENDIX "A" AT PAGE 32 IS THAT "[THE COURT] BEING OF THE OPINION THAT PLAINTIFF (UPCHURCH) WAS NOT ENTITLED TO NOTICE OF THE SALE UNDER THE DEED OF TRUST IN QUESTION..." THE IMPORTANCE OF THIS HOLDING CANNOT BE DIMINISHED OR EXPLAINED AWAY BY RESPONDENTS. THE FORWARDING OF TWENTY ONE (21) DAY ADVANCED WRITTEN NOTICE OF AN IMPENDING FORECLOSURE SALE IS REQUIRED UNDER

TEX. REV. CIV. STAT. ANN. ART. 3810 FROM THE HOLDER OF THE PROMISSORY NOTE SECURED BY THE DEED OF TRUST TO THOSE PERSONS INDEBTED UNDER THE SAME PROMISSORY NOTE TO THE EXTENT THAT THOSE PERSONS' NAMES ARE KNOWN TO THE HOLDER. THE UPCHURCH COURT DETERMINED, RIGHTFULLY OR WRONGFULLY, THAT UPCHURCH WAS NOT A PARTY ENTITLED TO NOTICE OF THE SALE AS PROVIDED BY THE STATUTE. PETITIONERS NOW COMMEND TO THIS HONORABLE COURT THE LOGICAL RESULT OF THAT HOLDING: IF UPCHURCH WAS NOT ENTITLED TO NOTICE OF THE SALE UNDER THE STATUTE, THEN HE DID NOT HAVE STANDING TO BRING SUIT FOR WRONGFUL FORECLOSURE UNDER THE STATUTE.

THIS CONCLUSION THAT THE UPCHURCH "JUDGMENT" WAS NOT A FINAL JUDGMENT IS FURTHER PROVED BY THE SECOND HOLDING IN THE DOCUMENT TO WHICH PETITIONERS REFER THE SUPREME COURT'S ATTENTION: "THAT PLAINTIFF (UPCHURCH) TAKE NOTHING IN THIS CAUSE AS PRESENTLY PLED..." THESE UNDERLINED WORDS WERE HAND INSERTED BY THE COURT WITH THE EFFECT OF CHANGING THE DOCUMENT ENTITLED "JUDGMENT" INTO SOMETHING ELSE. AGAIN, PETITIONERS URGE THE LOGIC OF THE LANGUAGE. IF A PARTY IS DENIED A REMEDY AS PRESENTLY PLED, THERE CAN BE NO DOUBT THAT HE, OR OTHERS, IS ENTITLED TO REPLEAD HIS CAUSE IN THE

FUTURE IN A MANNER THAT WOULD ENTITLE HIM TO RELIEF.

THE UPCHURCH COURT HELD THAT UPCHURCH WAS NOT ENTITLED TO NOTICE OF THE FORECLOSURE SALE AND SHOULD THEREFORE TAKE NOTHING AS PRESENTLY PLED. OBVIOUSLY, ON THE "JUDGMENT'S" FACE, THE UPCHURCH COURT DECIDED THAT UPCHURCH WAS NOT A PROPER PARTY, OR THAT HIS CAUSE OF ACTION WAS MISSING A NECESSARY OR INDISPENSABLE PARTY WHO IN ALL PROBABILITY IS ONE OF THE CURRENT PETITIONERS HEREIN, FRANK T. NAGLE, TRUSTEE, THE ONLY PARTY TO HAVE ACTUALLY EXECUTED THE PROMISSORY NOTES AND DEED OF TRUST THAT GAVE RISE TO THE FORECLOSURE SALE. UPON DETERMINING NOT TO PROCEED WITHOUT FRANK T. NAGLE, TRUSTEE, OR OTHERS OF PETITIONERS HEREIN, THE UPCHURCH COURT DISMISSED UPCHURCH'S CASE, WITHOUT PREJUDICE, AFTER HAVING CONSIDERED RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, THE THRUST OF WHICH WAS THAT UPCHURCH WAS NOT THE PROPER PARTY TO BRING THAT CAUSE OF ACTION. FURTHER, IF UPCHURCH COULD REPLEAD HIS CAUSE OF ACTION IN THE FUTURE, THEN THE DISPOSITION OF THE MATTER BY THE UPCHURCH COURT COULD NOT BE WITH PREJUDICE TO THE CAUSE OF ACTION OF UPCHURCH. THE ONLY LOGICAL EFFECT OF THE "JUDGMENT" WAS TO ALLOW UPCHURCH, ALONG WITH FRANT T. NAGLE, TRUSTEE,

AND PERHAPS OTHERS OF PETITIONERS HEREIN, TO BRING THE PRESENT CAUSE OF ACTION.

THE IMPORT AND EFFECT OF THIS TRUE CHARACTERIZATION OF THE "JUDGMENT" IS THAT THE UPCHURCH CAUSE OF ACTION IS NOT A FINAL JUDGMENT. THE UPCHURCH COURT NEVER REACHED THE MERITS OF THE CAUSE BECAUSE IT HELD THAT UPCHURCH DID NOT HAVE THE REQUISITE STANDING (NOT ENTITLED TO NOTICE), BUT DID ALLOW FOR FUTURE AMENDMENT SO AS TO REACH THE MERITS OF THE CAUSE OF ACTION (TAKE NOTHING AS PRESENTLY PLED). THEREFORE, BASED ON THE FOREGOING, THE UPCHURCH CAUSE OF ACTION CAN NOT BE RES JUDICATA WITH REGARD TO THE PRESENT ACTION.

THE HOLDING OF RES JUDICATA AMOUNTS TO AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY BY RESPONDENTS AND BY THE STATE OF TEXAS WITHOUT DUE PROCESS OF LAW. THIS IS BECAUSE NONE OF THE COURTS EVER INVOLVED IN EITHER CASE HAS EVER REACHED THE MERITS OF PETITIONERS' CLAIMS. UPCHURCH NEVER RECEIVED A DETERMINATION ON THE FACTUAL ISSUES BECAUSE IT WAS HELD, RIGHTFULLY OR WRONGFULLY, THAT HE WAS NOT ENTITLED TO NOTICE OF THE FORECLOSURE SALE; PETITIONERS HEREIN NEVER RECEIVED A FACTUAL RESOLUTION OF THEIR CAUSE OF ACTION WHEN THE TRIAL

COURT REFUSED TO SPECIFY ITS GROUNDS FOR RENDERING SUMMARY JUDGMENT AGAINST PETITIONERS. HOWEVER, SINCE ALL FACT ISSUES WERE CONTESTED BY PETITIONERS AT THE TRIAL COURT THROUGH TESTIMONY OR AFFIDAVIT, THE ONLY LEGAL BASIS TO GRANT RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AT THE TRIAL COURT WAS THE PROCEDURAL GROUND OF RES JUDICATA RAISED IN RESPONDENTS' MOTION FOR SUMMARY JUDGMENT. THE COURT OF APPEALS FOR THE 14TH SUPREME JUDICIAL DISTRICT OF TEXAS AFFIRMED THE TRIAL COURT ON THE GROUND OF RES JUDICATA. THE TEXAS SUPREME COURT REFUSED PETITIONERS' APPLICATION FOR WRIT OF ERROR FINDING NO REVERSIBLE ERROR, AND CONTINUED TO SO REFUSE EVEN THOUGH PETITIONERS RAISED THE PRESENT CONSTITUTIONAL ISSUES AND ALSO THE ISSUE OF FUNDAMENTAL ERROR IN PETITIONERS' MOTION FOR REHEARING.

PETITIONERS REQUEST THIS HONORABLE COURT TO CONSIDER THE LEGAL AND LOGICAL COMPULSION OF PETITIONERS' ARGUMENT THAT PETITIONERS HAVE BEEN DEPRIVED OF VALUABLE PROPERTY RIGHTS WITHOUT EVER HAVING THEIR DAY IN COURT. ADDITIONALLY, AS FURTHER ARGUMENT, PETITIONERS WOULD URGE THE COURT TO HOLD THAT TEX. REV. CIV. STAT. ANN. ART. 3810, AS IT HAS BEEN INTERPRETED AND ENFORCED BY THE TEXAS SUPREME COURT,

IS UNCONSTITUTIONAL BECAUSE IT ALLOWS FOR A PROPERTY OWNER TO BE DEPRIVED OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW.

ARTICLE 3810 IS THE DEVICE BY WHICH THE PROPERTY RIGHTS OF TEXAS CITIZENS ARE PROTECTED. THE STATUTE MANDATES THE FORWARDING OF WRITTEN NOTICE TO THE KNOWN OWNERS AT LEAST TWENTY ONE (21) DAYS PRIOR TO A FORECLOSURE SALE. THE HISTORY OF THIS CASE SHOWS THAT THE UPCHURCH COURT HELD THAT UPCHURCH WAS NOT ENTITLED TO NOTICE. THE TRIAL COURT IN THE PRESENT ACTION HELD THAT PETITIONERS WERE PRECLUDED FROM BRINGING SUIT BECAUSE OF RES JUDICATA. UPCHURCH WAS NOT ALLOWED TO ARGUE THE MERITS. PETITIONERS WERE PRECLUDED FROM ARGUING THE MERITS. NO ONE HAS EVER BEEN ALLOWED TO ARGUE THE MERITS AND OBTAIN RESOLUTION OF THE PERTINENT FACTUAL AND LEGAL ISSUES INVOLVED IN THIS CAUSE. THIS FACT ARISES FROM THE INTERPRETATION AND IMPLEMENTATION OF ARTICLE 3810 BY THE SUPREME COURT OF TEXAS. THE END RESULT IS THE UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF UNITED STATES CONSTITUTION, AMENDMENT V AND AMENDMENT XIV, §1.

CONCLUSION

Based on the foregoing, Petitioners would urge this Honorable Court to thoroughly and closly examine the "Judgment" of the Upchurch Court and find that the document, on its face, is not a final judgment disposing of all factual and legal issues of the cause of action of Upchurch to set aside the foreclosure sale by Respondents. If this Honorable Court so determines that the Upchurch "Judgment" is not a final judgment, then Petitioners' Application for Writ of Certiorari should be granted because the holding of the Supreme Court of Texas that Petitioners herein are precluded from asserting their causes of action on the ground of res judicata is in error and is an unconstitutional deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

/s/
Robert N. Winton

Counsel of Record for
Petitioners

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TEXAS ATTORNEY GENERAL

PURSUANT TO THE PROVISIONS OF RULE 28.4(c), RULES OF THE SUPREME COURT, YOU ARE HEREBY NOTIFIED THAT THE PROVISIONS OF 28 U.S.C. §2403(B) MAY BE APPLICABLE IN THIS MATTER.

/s/
ROBERT N. HINTON

CERTIFICATE OF SERVICE

I, ROBERT N. HINTON, A MEMBER OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES AND COUNSEL OF RECORD FOR ALL PETITIONERS HEREIN, HEREBY CERTIFY THAT ON THE 17th DAY OF OCTOBER, 1983, PURSUANT TO RULE 28.5(B), RULES OF THE SUPREME COURT, I SERVED THREE COPIES OF THE

FOREGOING PETITION FOR WRIT OF CERTIORARI ON EACH OF THE RESPONDENTS HEREIN BY FORWARDING THREE SUCH COPIES TO EACH OF RESPONDENTS' COUNSEL OF RECORD, HARRY M. REASONER AND JOHN L. CARTER, VINSON & ELKINS, 3000 FIRST CITY TOWER, HOUSTON, TEXAS 77002, AND TO JOE H. REYNOLDS AND THOMAS D. CORDELL, REYNOLDS, ALLEN, COOK, PANNILL & HOOPER, 1100 MILAM BUILDING, HOUSTON, TEXAS 77002, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED.

/s/

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No. 1,134,965

JOHN H. GRIMM, ET AL	§	IN THE DISTRICT COURT OF
	§	
V.	§	HARRIS COUNTY, T E X A S
	§	
FRED RIZK, ET AL	§	151ST JUDICIAL DISTRICT

JUDGMENT

BE IT REMEMBERED THAT ON THE 8TH DAY OF SEPTEMBER, 1981, CAME ON FOR HEARING THE MOTION OF THE DEFENDANTS FRED RIZK, EDWARD RIZK, CARL GROMATSKY, AND FRANK F. DAVIS FOR SUMMARY JUDGMENT, AND THE COURT, HAVING CONSIDERED THE ARGUMENTS OF COUNSEL, THE PLEADINGS, DEPOSITIONS, AND EXHIBITS ON FILE HEREIN AND THE AFFIDAVITS FILED BY THE PARTIES IN SUPPORT OF THEIR POSITIONS IN THIS SUMMARY JUDGMENT HEARING, BEING OF THE OPINION THAT SUCH MOTION SHOULD BE GRANTED, AND, COUNSEL FOR BRYAN W. SCOTT HAVING REQUESTED THAT HIS CAUSE OF ACTION AGAINST PLAINTIFFS FOR AN UNPAID ATTORNEY'S FEE BE SEVERED FROM THIS CAUSE, THE COURT BEING OF THE OPINION THAT THE CLAIM ASSERTED BY BRYAN W. SCOTT AGAINST PLAINTIFFS SHOULD BE SEVERED; IT IS, THEREFORE,

ORDERED, ADJUDGED, AND DECREED THAT PLAINTIFFS JOHN H. GRIMM, M.D., PAT MCBRIDE, FRANK T. NAGLE, TRUSTEE, JANCO, INC., AND THE TAYLOR TRUST, AND THOSE CLAIMING UNDER OR THROUGH THEM, TAKE NOTHING IN THIS CAUSE, AND IT IS FURTHER,

ORDERED, ADJUDGED, AND DECLARED THAT PLAINTIFFS-CROSS-DEFENDANTS JOHN H. GRIMM, M.D., PAT MCBRIDE, JANCO, INC., FRANK T. NAGLE, TRUSTEE, AND THE TAYLOR TRUST AND THIRD-PARTY DEFENDANTS FRANK T. NAGLE, INDIVIDUALLY, AND PLANTATION VENTURES, AND INTERVENOR BRYAN W. SCOTT ARE NOT ENTITLED TO HAVE THE SALE UNDER THE DEED OF TRUST TO THE PROPERTY DESCRIBED ON THE ATTACHED EXHIBIT "A" SET ASIDE AND, ACCORDINGLY, HAVE NO OWNERSHIP INTEREST IN THE PROPERTY DESCRIBED IN THAT EXHIBIT "A", AND IT IS FURTHER

ORDERED, ADJUDGED, AND DECREEED THAT ALL LIS PENDENS NOTICES FILED IN CONNECTION WITH THIS CAUSE BY PLAINTIFFS OR THIRD-PARTY DEFENDANTS ARE OF NO FURTHER FORCE AND EFFECT; AND IT IS FURTHER

ORDERED, ADJUDGED, AND DECREED THAT ALL COSTS OF THIS PROCEEDING BE TAXED AGAINST

PLAINTIFFS JOHN H. GRIMM, PAT MCBRIDE, FRANK T. NAGLE, JANCO, INC., AND THE TAYLOR TRUST FOR WHICH LET EXECUTION ISSUE IF NOT TIMELY PAID; AND IT IS FINALLY

ORDERED, ADJUDGED, AND DECREED THAT THE CLAIM OF THE LAW OFFICES OF BRYAN W. SCOTT FOR PAYMENT OF ITS ATTORNEY'S FEE AGAINST PLANTATION VENTURES, JOHN H. GRIMM, PAT MCBRIDE, AND WILLIAM R. UPCHURCH IS HEREBY SEVERED FROM THIS CAUSE AND SHALL BE ASSIGNED CAUSE NO. 1,134,965A, THE COSTS OF WHICH TO BE TAXED AGAINST INTERVENOR PENDING FINAL JUDGMENT IN THE SEVERED CAUSE.

THIS JUDGMENT IS IN ALL THINGS FINAL.

SIGNED AND ENTERED THIS THE 28TH DAY OF SEPTEMBER, 1981, AT 4:05, P.M.

JUDGE PRESIDING

APROVED AS TO FORM

SOWELL, OGG & HINTON

BY:

ROBERT M. HINTON (TBA #19711000-3)
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TRACTS ONE AND TWO:

A TRACT OF LAND, KNOWN AS THE PLANTATION APARTMENT PROJECT, OUT OF LOT THREE (3), BLOCK "B" OF THE LEVY AND GANT SUBDIVISION IN THE WILLIAM WHITE LEAGUE, ABSTRACT 836, HARRIS COUNTY, TEXAS, AS RECORDED IN VOLUME 1, PAGE 29 HARRIS COUNTY MAP RECORDS, AND BEING THE SAME PROPERTY CONVEYED TO FRED E. RIZK, BY DEED RECORDED IN VOLUME 5429, PAGE 235 DEED RECORDS OF HARRIS COUNTY, TEXAS; SAID TRACT BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

COMMENCING AT A POINT WHICH IS THE ORIGINAL SOUTHWEST CORNER OF SAID LOT 3, SAID POINT BEING THE EAST ROW LINE OF SAGE ROAD; WHICH HAS A ROW WIDTH OF 60 FEET;

THENCE N. 00° 21' W. 343.41 FEED ALONG THE EAST ROW LINE OF SAGE ROAD TO THE SOUTHWEST CORNER OF SAID TRACT 2 TO A POINT, WHICH IS THE PLACE OF BEGINNING;

THENCE N. 00° 22' W. 280.61 FEET ALONG THE EAST ROW LINE OF SAGE ROAD TO AN ANGLE POINT ON THE CENTER LINE OF A PRIVATE DRIVE;

THENCE N. 00° 23' 41" W. 280.76 FEET ALONG THE EAST ROW LINE OF SAGE ROAD TO A POINT FOR CORNER;

THENCE S. 89° 52' 22" EAST 273.21 FEET ALONG THE NORTH LINE OF SUBJECT TRACT TO A POINT FOR CORNER WHICH IS THE NORTHEAST CORNER OF THE TRACT;

THENCE S. 00° 20' 36" E. 280.62 FEET ALONG THE EAST LINE OF THE PROPERTY TO A POINT FOR ANGLE ON THE CENTER LINE OF A PRIVATE ROAD;

THENCE S. 00° 12' 30" E. 280.88 FEET ALONG THE EAST LINE OF SUBJECT PROPERTY TO A POINT FOR CORNER;

THENCE N. 89° 50' 30" W. 272.25 FEET ALONG THE SOUTH LINE OF SUBJECT PROPERTY TO A POINT FOR CORNER WHICH IS THE SOUTHWEST CORNER OF THE PROPERTY AND THE PLACE OF BEGINNING AND CONTAINING 3.5163 ACRES OF LAND, MORE OR LESS.

A TRACT OF LAND OUT OF THE EASTERN PORTION OF THE PLANTATION APARTMENT PROJECT, OUT OF LOT THREE (3), BLOCK "R" OF THE LEVY AND GANT SUBDIVISION, IN THE WILLIAM WHITE LEAGUE, ABSTRACT 836, HARRIS COUNTY, TEXAS, AS RECORDED IN VOLUME 130, PAGE 48 OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS, AND BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:

COMMENCING AT A POINT WHICH IS THE ORIGINAL SOUTHWEST CORNER OF THE SAID LOT 3, SAID POINT BEING ON THE EAST ROW LINE OF SAGE ROAD WHICH HAS A ROW WIDTH OF 60 FEET;

THENCE N. 00° 22' W. 343.41 FEET ALONG THE EAST ROW LINE OF SAGE ROAD TO A POINT FOR CORNER, WHICH IS THE SOUTHWEST CORNER OF THE PLANTATION APARTMENT PROJECT, TRACT 2;

THENCE S. 89° 50' 30" E. 272.25 FEET ALONG THE SOUTH PROPERTY LINE OF THE PLANTATION APARTMENT PROJECT, TRACT 2 TO A POINT FOR CORNER WHICH IS THE SOUTHEAST CORNER OF TRACT 2 AND THE SOUTHWEST CORNER OF TRACT 3 AND WHICH IS THE PLACE OF BEGINNING;

THENCE N. 00° 12' 30" W. 280.88 FEET ALONG THE WEST PROPERTY LINE OF TRACT 3 AND WHICH IS THE EAST PROPERTY LINE OF TRACT

2, TO AN ANGLE POINT IN THE CENTER LINE OF A PRIVATE DRIVE;

THENCE N. 00° 20' 36" W. 280.62 FEET ALONG THE WEST PROPERTY LINE OF TRACT 3 AND WHICH IS THE EAST PROPERTY LINE OF TRACT 1 TO A POINT FOR CORNER;

THENCE East 270.57 FEET ALONG THE NORTH PROPERTY LINE OF TRACT 3 TO A POINT FOR CORNER WHICH IS THE NORTHEAST CORNER OF SAID TRACT;

THENCE S. 00° 09' 18" E. 266.07 FEET ALONG THE EAST PROPERTY LINE OF TRACT 3, TO AN ANGLE POINT;

THENCE S. 00° 12' 30" E. 296.19 FEET ALONG THE EAST PROPERTY LINE OF TRACT 3, TO A POINT FOR CORNER;

THENCE N. 89° 50' 30" W. 270.0 FEET ALONG THE SOUTH PROPERTY LINE OF TRACT 3 TO A POINT FOR CORNER WHICH IS THE SOUTHWEST CORNER OF TRACT 3 AND THE SOUTHEAST CORNER OF TRACT 2 AND WHICH IS THE PLACE OF BEGINNING AND CONTAINING 3.4812 ACRES.

JUDGMENT

JOHN H. GRIMM, ET AL

VS.

FRED RIZK, ET AL

"THIS CAUSE, AN APPEAL FROM THE JUDGMENT IN FAVOR OF FRED RIZK, ET AL, SIGNED SEPTEMBER 28, 1981, CAME ON TO BE HEARD ON THE TRANSCRIPT OF THE RECORD. THE SAME HAVING BEEN INSPECTED, IT IS THE OPINION OF THIS COURT THAT THERE IS NO ERROR IN THE JUDGMENT. IT IS ORDERED AND ADJUDGED THAT THE JUDGMENT OF THE COURT BELOW BE AFFIRMED.

IN ADDITION, IT IS ORDERED THAT JOHN H. GRIMM, ET AL, AND THEIR SURETY, GENERAL INDEMNITY INSURANCE COMPANY, PAY ALL COSTS INCURRED BY REASON OF THIS APPEAL. IT IS FURTHER ORDERED THAT THIS DECISION BE CERTIFIED BELOW FOR OBSERVANCE."

AFFIRMED AND OPINION FILED AUGUST 5, 1982.

A2982 JOHN H. GRIMM, ET AL, APPELLANTS

VS.

FRED RIZK, ET AL, APPELLEES

APPEAL FROM 151ST DISTRICT
COURT
OF HARRIS COUNTY
CAUSE NO. 1,134,965

O P I N I O N

APPELLANTS (PLAINTIFFS BELOW) JOHN H. GRIMM, PAT MCBRIDE, FRANK T. NAGLE, TRUSTEE AND THE TAYLOR TRUST APPEAL A SUMMARY JUDGMENT GRANTED IN FAVOR OF APPELLEES FRED RIZK, EDWARD RIZK, CARL GROMATZKY AND FRANK F. DAVIS (DEFENDANTS BELOW) IN A SUIT TO SET ASIDE A DEED OF TRUST FORECLOSURE SALE OF THE PLANTATION APARTMENTS LOCATED IN HOUSTON, TEXAS, AND FOR DAMAGES FOR WRONGFUL FORECLOSURE. IN THEIR

THIRD AMENDED PETITION, APPELLANTS GRIMM, MCBRIDE AND NAGLE, TRUSTEE, CLAIMED TO BE DEBTORS UNDER THE DEED OF TRUST AND ALLEGED THEY WERE NOT GIVEN NOTICE OF FORECLOSURE AS REQUIRED BY TEX. REV. CIV. STAT. ANN. ART. 3810 (VERNON SUPP. 1981). WE HOLD THE TRIAL COURT PROPERLY GRANTED THE APPELLEES' MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANTS' CLAIMS ARE BARRED BY THE DOCTRINE OF RES JUDICATA. WE AFFIRM.

IN THIS CASE, WE HOLD THAT THE CLAIMS OF APPELLANTS ARE BARRED UNDER THE DOCTRINE OF RES JUDICATA BY REASON OF A FINAL TAKE-NOTHING JUDGMENT ON THE MERITS IN AN EARLIER LAWSUIT FILED BY WILLIAM R. UPCHURCH, TRUSTEE, (A PARTY IN PRIVITY WITH THEM) AGAINST ALL APPELLEES, EXCEPT FRANK DAVIS, ARISING OUT OF THE SAME SUBJECT MATTER AND TRANSACTION FORMING THE BASIS OF THIS SUIT. THIS SUIT WAS FILED APPROXIMATELY TWO MONTHS AFTER FINAL JUDGMENT IN THE EARLIER CASE. BOTH SUITS SOUGHT TO SET ASIDE THE DEED OF TRUST FORECLOSURE OF THE PLANTATION APARTMENTS AND FOR DAMAGES FOR WRONGFUL FORECLOSURE. THE PLEADINGS IN BOTH CASES ALLEGING THE TRANSACTION AND SURROUNDING CIRCUMSTANCES ARE ALMOST IDENTICAL.

THE RECORD OWNER OF THE PLANTATION APARTMENTS IN JANUARY, 1976, WAS FRED RIZK. APPELLEES DR. EDWARD RIZK AND CARL GROMATSKY HAD A BENEFICIAL INTEREST IN THE PROPERTY. ON OR ABOUT JANUARY 1, 1976, A PARTNERSHIP NAMED PLANTATION LTD. WAS FORMED TO PURCHASE THE PLANTATION APARTMENTS. THE GENERAL PARTNER WAS JANCO, INC., A CORPORATION OWNED BY WILLIAM R. UPCHURCH. THE LIMITED PARTNERS WERE APPELLANTS GRIMM, MCBRIDE AND NAGLE, TRUSTEE. NAGLE ACTED AS TRUSTEE FOR PLANTATION LTD. IN THE PURCHASE, SALE AND LEASE OF PLANTATION APARTMENTS. ON JANUARY 13, 1976, THE PLANTATION APARTMENTS WERE SOLD BY FRED RIZK TO FRANK T. NAGLE, TRUSTEE FOR A TOTAL CONSIDERATION OF $4,300,000.00. AS PART OF THE CONSIDERATION FOR THE PURCHASE OF THE PLANTATION APARTMENTS, NAGLE, TRUSTEE, EXECUTED TWO PROMISSORY NOTES, ONE FOR ONE MILLION THREE HUNDRED THOUSAND DOLLARS ($1,300,000.00) AND ONE FOR THREE HUNDRED THOUSAND DOLLARS ($300,000.00). THESE NOTES WERE SECURED BY A DEED OF TRUST TO THE PLANTATION APARTMENTS WITH DAN ARNOLD NAMED AS TRUSTEE AND FRED RIZK AS BENEFICIARY. ADDITIONAL DOCUMENTS ALSO EXECUTED AT THE CLOSING ON JANUARY 13, 1976 WERE: A PARTNERSHIP AGREEMEENT BETWEEN JOHN H. GRIMM, PAT MCBRIDE, FRANK T. NAGLE, TRUSTEE, AND ANOTHER INDIVIDUAL RESULT-

ING IN THE FORMATION OF PLANTATION VENTURES (PLANTATION VENTURES IN TURN CREATED THE TAYLOR TRUST, TITLE HOLDER TO THE REALTY OF THE PLANTATION APARTMENTS IN WHICH FRANK T. NAGLE AND WILLIAM R. UPCHURCH ACTED AS CO-TRUSTEES); A WARRANTY DEED CONVEYING THE PLANTATION APARTMENTS FROM FRANK NAGLE, TRUSTEE, TO THE TAYLOR TRUST; AND A LEASE AGREEMENT BETWEEN THE TAYLOR TRUST, AS LESSOR, AND FRANK T. NAGLE, TRUSTEE, AS LESSEE.

THE THREE HUNDRED THOUSAND DOLLAR NOTE EXECUTED AS PART OF THE CONSIDERATION FOR THE PURCHASE OF PLANTATION APARTMENTS WAS DUE AND PAYABLE ON APRIL 10, 1976. APPELLANT MADE NO PAYMENT ON THE NOTE ON THAT DATE AND THUS, DEFAULTED IN ITS PAYMENT. AS OF JUNE 14, 1976, APPELLANT HAD PAID ONLY TEN THOUSAND DOLLARS ($10,000.00) OF PRINCIPAL ON THE THREE HUNDRED THOUSAND DOLLAR NOTE PLUS INTEREST AND REMAINED IN DEFAULT. THESE PAYMENTS WERE MADE BY UPCHURCH, TRUSTEE. FRED RIZK, UNDER THE POWER GRANTED HIM IN THE NOTES AND DEED OF TRUST, ACCELERATED TO THAT DATE THE BALANCE DUE ON THE ONE MILLION THREE HUNDRED THOUSAND DOLLAR NOTE. THE PROPERTY WAS POSTED FOR FORECLOSURE SALE BY FRANK F. DAVIS, SUBSTITUTE TRUSTEE,

UNDER THE DEED OF TRUST. WRITTEN NOTICE OF FORECLOSURE WAS FORWARDED BY CERTIFIED MAIL TO NAGLE, TRUSTEE, THE MAKER OF THE NOTES AT NAGLE'S ADDRESS CONTAINED IN THE DEED OF TRUST.

PRIOR TO JUNE 14, 1976, APPELLEE GROMATSKY HAD DISCUSSED THE PAYMENT OF THE THREE HUNDRED THOUSAND DOLLAR NOTE WITH WILLIAM R. UPCHURCH, THE AGENT, PARTNER AND/OR TRUSTEE OF THE APPELLANTS AND BROUGHT TO UPCHURCH'S ATTENTION THAT THE NOTE HAD NOT BEEN PAID WHEN IT WAS DUE ON APRIL 10, 1976. UPCHURCH TENDERED A CHECK TO APPELLEE GROMATSKY FOR DELIVERY TO APPELLEE RIZK BUT IT WAS RETURNED DUE TO INSUFFICIENT FUNDS AND UPCHURCH WAS SO ADVISED. APPELLEE FORECLOSED ON THE DEED OF TRUST TO THE PLANTATION APARTMENTS ON JULY 6, 1976.

APPROXIMATELY EIGHT MONTHS AFTER THE FORECLOSURE, WILLIAM R. UPCHURCH, TRUSTEE, FILED SUIT IN THE 129TH DISTRICT COURT OF HARRIS COUNTY TO SET ASIDE THE FORECLOSURE SALE AND FOR DAMAGES FOR WRONGFUL FORECLOSURE. THE DEFENDANTS IN THAT SUIT WERE APPELLEES FRED RIZK, EDWARD RIZK AND CARL GROMATSKY. UPCHURCH HAD NO INDIVIDUAL INTEREST IN THE PROPERTY AND MAINTAINED THE SUIT SOLELY IN A REPRESENTATIVE

CAPACITY AS TRUSTEE. HE ALLEGED IN THAT SUIT THAT HE WAS A DEBTOR BUT WAS NOT GIVEN NOTICE OF FORECLOSURE AS REQUIRED BY TEX. REV. CIV. STAT. ANN. ART. 3810 (VERNON SUPP. 1981). HE ALLEGED THAT THE ONLY DEBTOR TO RECEIVE NOTICE OF THE FORECLOSURE WAS FRANK NAGLE, TRUSTEE. THE TRIAL COURT GRANTED A SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON MAY 2, 1977, AND ORDERED THAT PLAINTIFF WILLIAM R. UPCHURCH, TRUSTEE, TAKE NOTHING IN THAT SUIT.

IT IS APPARENT THAT THIS SUIT WAS MAINTAINED FOR THE BENEFIT OF APPELLEES AND THAT HAD UPCHURCH BEEN SUCCESSFUL THE RECOVERY OF THE PROPERTY AND/OR DAMAGES WOULD HAVE REVERTED TO APPELLEES, PARTICULARLY SINCE UPCHURCH HAD NO INDIVIDUAL INTEREST IN THE PROPERTY.

APPROXIMATELY TWO MONTHS AFTER THAT FINAL JUDGMENT WAS SIGNED, APPELLANTS AND JANCO, INC. FILED THIS SUIT AGAINST APPELLEES TO SET ASIDE THE SAME DEED OF TRUST FORECLOSURE AND FOR DAMAGES FOR WRONGFUL FORECLOSURE. APPELLANT'S THIRD AMENDED PETITION MADE SUBSTANTIALLY THE SAME ALLEGATIONS AS IN THE FIRST SUIT INSOFAR AS THE FACTS AND CIRCUMSTANCES OF THE TRANSACTION LEADING UP TO THE FORECLOSURE ARE CONCERNED. APPELLANTS, IN ADDITION TO AL-

LEGING LACK OF NOTICE TO UPCHURCH, TRUSTEE OF THE FORECLOSURE SALE, ALSO ALLEGED THAT GRIMM AND MCBRIDE AND NAGLE, TRUSTEE WERE DEBTORS AND DID NOT RECEIVE NOTICE OF FORECLOSURE AS REQUIRED BY TEX. REV. CIV. STAT. ANN. ART 3810 (VERNON 1970). APPELLEES FILED THIRD PARTY DEFENDANT ACTIONS AGAINST PLANTATION VENTURES, A PARTNERSHIP, AND FRANK T. NAGLE, INDIVIDUALLY. APPELLEES' MOTION FOR SUMMARY JUDGMENT WAS BASED ON SEVERAL GROUNDS INCLUDING RES JUDICATA. THE TRIAL COURT GRANTED THE SUMMARY JUDGMENT IN FAVOR OF APPELLEES AGAINST ALL PARTIES. THE JUDGMENT BECAME FINAL AGAINST PLANTATION VENTURES AND FRANK NAGLE, INDIVIDUALLY, WITHOUT ANY APPEAL BEING TAKEN. NAGLE OWNED NO INTEREST INDIVIDUALLY IN THE PROPERTY AND MAINTAINED THE SUIT ONLY IN A REPRESENTATIVE CAPACITY AS TRUSTEE. HE IS TRUSTEE OF JANCO, INC., OWNED BY WILLIAM P. UPCHURCH, THE GENERAL PARTNER OF PLANTATION LTD., AND IS CO-TRUSTEE OF TAYLOR TRUST WITH WILLIAM R. UPCHURCH. JANCO, INC., PERFECTED AN APPEAL ALONG WITH THE OTHER APPELLANTS, BUT HAS FILED NO BRIEF NOR MADE ANY APPEARANCE ON APPEAL. PURSUANT TO TEX. REV. CIV P. 415 THE APPEAL OF JANCO, INC. IS DISMISSED.

On appeal, appellants contend (1) that the judgment in the first suit by Upchurch, Trustee, is not res judicata as to this case; (2) that the substitute trustee did not comply with the notice provisions of the deed of trust since the notice of intended foreclosure was not personally sent by the substitute trustee, but rather was prepared by a law partner of the substitute trustee and mailed by a secretary of Fred Rizk, the beneficiary; (3) that the required notices under TEX. REV. CIV. STAT. ANN. 3810 (Vernon Supp. 1981) were not sent to the debtors, whom appellants claim to be Upchurch, Trustee, Nagle, Trustee, Grimm and McBride, and (4) that appellees failed to negate the existence of waiver and estoppel of the right to accelerate the notes.

Appellees reply that (1) res judicata applies to this case; (2) that the phrase "trustee or person acting for him" contained in the deed of trust authorizes the law partner of the substitute trustee to prepare the notice and the beneficiary to mail such notice; (3) the only debtor was Nagle, Trustee, and that notice was properly mailed to him at his last known address by certified mail return receipt requested as required by Article 3810; (4) the

POINTS OF WAIVER AND ESTOPPEL WERE FIRST RAISED BY APPELLANTS ON APPEAL; AND (5) THE ISSUE OF NOTICE BY THE SUBSTITUTE TRUSTEE UNDER THE PROVISIONS OF THE DEED OF TRUST AS AN ADDITIONAL REQUIREMENT TO THE NOTICE PROVISION OF ARTICLE 3810 WAS NOT ALLEGED BY APPELLANTS IN THEIR THIRD AMENDED PETITION AS A GROUND OF RECOVERY, AND THEREFORE WAS NOT ENTITLED TO BE RAISED ON APPEAL.

WE AGREE THAT APPELLANTS' CLAIMS IN THIS SUIT ARE PRECLUDED UNDER THE DOCTRINE OF RES JUDICATA BY REASON OF THE FINAL JUDGMENT IN THE FIRST SUIT BROUGHT BY WILLIAM UPCHURCH, TRUSTEE. BECAUSE OF THE QUESTION OF PRIVITY AS IT RELATES TO RES JUDICATA, IT IS IMPORTANT TO UNDERSTAND THE CLOSE INTERRELATIONSHIP OF APPELLANTS IN THIS LAWSUIT AND UPCHURCH, TRUSTEE, PLAINTIFF IN THE FIRST SUIT.

A FINAL JUDGMENT BINDS THOSE WHO ARE PARTIES TO THE ORIGINAL CAUSE AND THOSE IN PRIVITY WITH THEM. PRIVITY CONNOTES THOSE WHO ARE IN LAW SO CONNECTED WITH A PARTY TO THE JUDGMENT AS TO HAVE SUCH AN IDENTITY OF INTEREST THAT THE PARTY TO THE JUDGMENT REPRESENTED THE SAME LEGAL RIGHT. Benson v. Wanda Petroleum Co., 468 S.W.2d 361, 363 (Tex.

1971). THERE IS NO GENERALLY PREVAILING DEFINITION OF PRIVITY WHICH CAN BE AUTOMATICALLY APPLIED TO ALL CASES INVOLVING THE DOCTRINE OF RES JUDICATA AND THE DETERMINATION OF WHO ARE PRIVIES REQUIRES CAREFUL EXAMINATION INTO THE CIRCUMSTANCES OF EACH CASE AS IT ARISES. BENSON V. WANDA PETROLEUM CO., SUPRA AT P. 363. A PERSON WHO CONTROLS A SUIT IS BOUND BY THE ADJUDICATIONS OF LITIGATED MATTERS AS IF HE WERE A PARTY WHERE HE HAS A PROPRIETARY OR FINANCIAL INTEREST IN THE JUDGMENT OR IN THE DETERMINATION OF A QUESTION OF FACT OR OF LAW WITH REFERENCE TO THE SAME SUBJECT MATTER OR TRANSACTION. BENSON, SUPRA AT PP. 363-364. SEE ALSO TEXAS WATER RIGHTS COMMISSION V. CROW IRON WORKS, 582 S.W.2D 768 (TEX. 1979).

APPELLANTS' CLAIM THAT THE PRIVITY RELATIONSHIP SUPPORTING APPLICATION OF RES JUDICATA IS NONEXISTENT IN THE PRESENT CASE BECAUSE THERE IS NO EVIDENCE THAT SHOWS WILLIAM R. UPCHURCH, TRUSTEE, REPRESENTED THE RIGHTS OR INTEREST OF THE APPELLANTS IN THAT FIRST SUIT OR WAS AUTHORIZED TO MAINTAIN THAT SUIT IN THEIR BEHALF. WE DISAGREE. WE BELIVE THE REQUISITE PRIVITY EXISTS. UPCHURCH WAS TRUSTEE FOR EACH OF THE APPELLANTS AND WAS ALSO THEIR PARTNER AND AGENT. HAD UPCHURCH PREVAILED IN THE FIRST

SUIT, THERE IS NO DOUBT THE PROPERTY AND/OR DAMAGES RECOVERED WOULD HAVE REVERTED TO THE BENEFIT OF APPELLANTS. THE PRESENT LAWSUIT SEEKS THE SAME RELIEF AS THE FIRST SUIT.

NEITHER UPCHURCH NOR NAGLE HAD ANY INDIVIDUAL INTEREST IN THE PURCHASE OF PLANTATION APARTMENTS, AND BOTH WERE ACTING AT ALL TIMES IN A REPRESENTATIVE CAPACITY. UPCHURCH WAS A TRUSTEE OF APPELLANT TAYLOR TRUST, THE TITLE HOLDER OF THE PLANTATION APARTMENTS, AND HE REMAINS A TRUSTEE OF THE TAYLOR TRUST TODAY. UPCHURCH, TRUSTEE, IS ALSO A BENEFICIARY OF THE TAYLOR TRUST. APPELLANT JOHN H. GRIMM AND PAT MCBRIDE WERE THE REMAINING BENEFICIARIES OF THE TAYLOR TRUST. JOHN H. GRIMM, PAT MCBRIDE, NAGLE, TRUSTEE AND UPCHURCH WERE PARTNERS IN PLANTATION LTD. FURTHER, APPELLANTS ADMIT IN THEIR DEPOSITION AND ALSO IN THEIR BRIEF THAT UPCHURCH AS TRUSTEE ACTED AS AGENT FOR APPELLANTS GRIMM AND MCBRIDE IN THE PURCHASE OF THE PLANTATION APARTMENTS.

APPELLANT TAYLOR TRUST WAS REPRESENTED IN THE PRIOR LAWSUIT THROUGH ITS TRUSTEE, WILLIAM R. UPCHURCH. UPCHURCH AS TRUSTEE WAS ALSO A BENEFICIARY OF THE TAYLOR TRUST. THE REMAINING BENEFICIARIES OF THE TAYLOR TRUST WERE GRIMM

AND McBRIDE. THUS, ALL THE BENEFICIARIES OF THE TRUST INCLUDING GRIMM AND McBRIDE WERE REPRESENTED BY UPCHURCH, TRUSTEE, IN THE FIRST SUIT. THE BENEFICIARIES OF A TRUST ARE BOUND BY A JUDGMENT AGAINST THEIR TRUSTEE. SLAY V. BURNETT TRUST, 187 S.W.2D 377 (TEX. 1945). IN ADDITION, GRIMM, McBRIDE AND NAGLE, TRUSTEE, WERE MEMBERS OF A PARTNERSHIP WITH UPCHURCH IN THE ATTEMPTED OWNERSHIP OF THE PLANTATION APARTMENTS. A JUDGMENT AGAINST THEIR PARTNER, WILLIAM R. UPCHURCH, IS THEREFORE, RES JUDICATA AS TO THE CLAIMS OF THE REMAINING PARTNERS. EVERY PARTNER IS AN AGENT OF THE PARTNERSHIP AND HIS ACTIONS BIND THE PARTNERSHIP. TEX. REV. CIV. STAT. ANN. ART. 6132(B) §9(1) (VERNON 1970). SEE ALSO HAMMONDS V. HOLMES, 559 S.W.2D 345, 347 (TEX. 1977). THE TEXAS PARTNERSHIP ACT CONTEMPLATES THAT A PARTNERSHIP AS A WHOLE IS CHARGED WITH KNOWLEDGE OF OR NOTICE TO A PARTNER. TEX. REV. CIV. STAT. ANN. ART. 6132(B) §12 (VERNON 1970). FINALLY, APPELLANTS GRIMM AND McBRIDE ADMIT THAT UPCHURCH, TRUSTEE, WAS AUTHORIZED TO ACT AS THEIR AGENT IN THE NEGOTIATION AND PURCHASE OF THE PLANTATION APARTMENTS WHICH HE DID. THE JUDGMENT AGAINST THEIR AGENT, UPCHURCH, TRUSTEE, THEREFORE, IS RES JUDICATA AS TO THE CLAIMS OF GRIMM AND McBRIDE. A PRINCIPAL IS BOUND BY THE RESULT OF

LITIGATION BROUGHT BY HIS AGENT "FOR THE PURPOSE OF CONSERVING OR BENEFITING THE PROPERTY RIGHTS INVOLVED." AROUAINI V. BATTISTIC, 113 S.W.2D 667, 672 (TEX. CIV. APP. - DALLAS, 1938 WRIT DISM'D). NAGLE, TRUSTEE, APPELLANT IN THIS CASE, MERELY REPRESENTS SOME OF THE SAME INTERESTS PREVIOUSLY REPRESENTED BY UPCHURCH, TRUSTEE, IN THE FIRST SUIT. THUS, ALL OF THE INTERESTS OF ALL THE APPELLANTS IN THE PRESENT CASE WERE PREVIOUSLY REPRESENTED BY UPCHURCH, TRUSTEE, IN THE FIRST LAWSUIT ARISING OUT OF THE SAME SUBJECT MATTER AND TRANSACTION AND SEEKING THE SAME RELIEF.

LIKEWISE, ALL THE APPELLEES EXCEPT DAVIS WERE PARTIES TO THE FIRST SUIT. DESPITE SOME LANGUAGE WHICH SEEMS TO INDICATE TO THE CONTRARY IN HAMMONDS V. HOLMES, SUPRA, WE ALSO BELIEVE THE INTEREST OF DAVIS, SUBSTITUTE TRUSTEE, WAS REPRESENTED IN THE PRIOR LAWSUIT AGAINST THE BENEFICIARY OF SUCH TRUST INSTRUMENT UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE PARTICULARLY AS RELATING TO THE QUESTION OF NOTICE OF THE PROPOSED FORECLOSURE.

ONCE WE FIND THAT THE REQUISITE PRIVITY EXISTS, THE QUESTION BECOMES THE SCOPE OF THE APPLICATION OF THE DOCTRINE OF RES JUDICATA. A

CAREFUL READING OF THE ORIGINAL PETITION FILED IN THE FIRST SUIT DEMONSTRATES THAT IT ENCOMPASSED EVERY CLAIM NOW ASSERTED BY THE APPELLANTS. IT WAS ALLEGED IN THE FIRST LAWSUIT THAT APPELLEE CARL GROMATZKY WAS INVOLVED IN THE NEGOTIATIONS FOR THE PURCHASE OF THE PLANTATION APARTMENTS AND KNEW THAT PARTIES OTHER THAN NAGLE, TRUSTEE WERE INVOLVED. IT IS FURTHER ALLEGED THAT UPCHURCH, THE REPRESENTATIVE OF APPELLANTS HEREIN, WAS NOT GIVEN NOTICE OF THE FORECLOSURE PURSUANT TO TEX. REV. CIV. STAT. ANN. ART. 3810 (VERNON SUPP. 1981). IT ALSO ALLEGED THAT GROMATZKY AGREED WITH UPCHURCH THAT FORECLOSURE WOULD NOT TAKE PLACE IF INTEREST PAYMENTS WERE MADE ON THE THREE HUNDRED THOUSAND DOLLAR NOTE. THESE CONTENTIONS, ALTHOUGH COUCHED IN SOMEWHAT DIFFERENT LANGUAGE, WERE ALL ASSERTED BY APPELLANTS IN THIS CASE. THOSE CLAIMS, HAVING BEEN DECIDED IN THE FIRST LAWSUIT, MAY NOT BE RELITIGATED. ABBOTT LABORATORIES V. GRAVIS, 470 S.W.2D 639, 642 (TEX. 1971).

APPELLANTS ASSERT THAT ADDITIONAL GROUNDS OF RECOVERY ARE ALLEGED IN THIS SUIT WHICH WERE NOT ALLEGED IN THE FIRST SUIT. A DIFFERENT FACTUAL ALLEGATION IS MADE THAT NAGLE, TRUSTEE, DID NOT RECEIVE A NOTICE OF FORECLOSURE AS RE-

QUIRED BY ARTICLE 3810, WHEREAS UPCHURCH, TRUSTEE, SPECIFICALLY ALLEGED IN HIS SUIT THAT NAGLE, TRUSTEE, WAS THE ONLY DEBTOR THAT DID RECEIVE NOTICE. ADDITIONALLY, IT IS ALLEGED IN THIS SUIT THAT GRIMM AND MCBRIDE WERE ALSO DEBTORS WHO DID NOT RECEIVE NOTICE OF FORECLOSURE. ALL OF THE CLAIMS MADE BY APPELLANTS IN THIS SUIT COULD HAVE BEEN MADE BY UPCHURCH, TRUSTEE, IN THE FIRST SUIT, AND WE BELIEVE THEY ARE ALSO BARRED BY RES JUDICATA.

"THE SCOPE OF RES JUDICATA IS NOT LIMITED TO MATTERS ACTUALLY LITIGATED; THE JUDGMENT IN THE FIRST SUIT PRECLUDES THE SECOND ACTION BY THE PARTIES AND THEIR PRIVIES NOT ONLY ON MATTERS ACTUALLY LITIGATED, BUT ALSO ON CAUSES OF ACTION OR DEFENSES WHICH ARISE OUT OF THE SAME SUBJECT MATTER AND WHICH MIGHT HAVE BEEN LITIGATED IN THE FIRST SUIT." TEXAS WATER RIGHTS COMMISSION V. CROW IRON WORKS, 582 S.W.2D 768, 771-72 (TEX. 1979) CITING GRIFFIN V. HOLDIAY INNS OF AMERICA, 496 S.W.2D 535 (TEX. 1973); ABBOTT LABORATORIES V. GRAVIS, 470 S.W.2D 639 (TEX. 1971); OGLETREE V. CRATES, 363 S.W.2D 431 (TEX. 1963); HANRICK V. GURLEY, 93 TEX. 458, 56 S.W. 330 (1900); FREEMAN V. MCANINCH, 87 TEX. 132, 27 S W. 97, 99 (TEX. 1894).

THE COURT IN GILBERT V. FIRESIDE ENTERPRISES, INC., 611 S.W.2D 869 (TEX. CIV. APP. - DALLAS, 1980, NO WRIT) DISCUSSED AND ANALYZED MANY OF THE RES JUDICATA DECISIONS DEALING WITH THE SCOPE OF THE DOCTRINE'S APPLICATION AND ATTEMPTED TO RECONCILE SUCH DECISIONS PARTICULARLY ON THE QUESTION OF WHETHER A DIFFERENT CAUSE OF ACTION WAS ALLEGED IN THE SECOND SUIT, AND IF IT WAS, WHETHER IT WAS PRECLUDED BY THE JUDGMENT IN THE FIRST SUIT. THE COURT DECIDED WHETHER RES JUDICATA SHOULD APPLY IN THAT CASE BASED UPON POLICY CONSIDERATIONS. WE BELIEVE THAT DUE TO THE CLOSE INTERRELATIONSHIP OF THE PARTIES, THE SAME CLAIMS FOR RELIEF IN BOTH SUITS FOR DAMAGES AND TO SET ASIDE FORECLOSURE ARISING OUT OF THE IDENTICAL SUBJECT MATTER AND TRANSACTION, AS WELL AS THE POLICY CONSIDERATIONS FOR APPLICATION OF THE DOCTRINE, WE ARE LED TO THE CONCLUSION THAT THE PRESENT SUIT BY APPELLANTS IS PRECLUDED BY THE TAKE-NOTHING JUDGMENT IN THE FIRST SUIT AND THAT SUMMARY JUDGMENT WAS PROPERLY GRANTED BY THE TRIAL COURT.

APPELLANTS CONTEND THAT THE INSERTION OF THE WORDS "AS PRESENTLY PLED" BY THE TRIAL JUDGE IN THE FIRST JUDGMENT AFTER THE WORDS THAT PLAINTIFF "TAKE NOTHING IN THIS CAUSE" HAD

THE EFFECT OF TURNING THAT FINAL JUDGMENT INTO AN ORDER OF DISMISSAL WITHOUT PREJUDICE, AND THEREBY PERMITTED UPCHURCH, TRUSTEE TO REFILE HIS LAWSUIT AT A LATER DATE ALLEGING ADDITIONAL GROUNDS OF RECOVERY IF HE CHOSE TO DO SO. APPELLANTS CITE NO AUTHORITIES NOR CAN WE FIND ANY THAT SUPPORT THEIR INTERPRETATION OF THAT JUDGMENT. THE FINAL JUDGMENT ENTERED BY THE TRIAL JUDGE IN THE FIRST SUIT SPECIFICALLY PROVIDED IN TWO INSTANCES THAT PLAINTIFF "TAKE NOTHING IN THIS CAUSE." THE RECITATION PARAGRAPH OF THE JUDGMENT SPECIFICALLY STATED THAT THE COURT WAS "OF THE OPINION THAT PLAINTIFF WAS NOT ENTITLED TO NOTICE OF THE SALE UNDER THE DEED OF TRUST IN QUESTION." ALL CLAIMS FOR RELIEF AND THEORIES RELIED ON WERE DISPOSED OF BY THE JUDGMENT, AND THE ORDER RECITED THAT PLAINTIFF "TAKE NOTHING IN THIS CAUSE." IT WAS A FINAL JUDGMENT ON THE MERITS AND WAS NOT AN INTERLOCUTORY JUDGMENT. THERE WAS NO DISMISSAL WITHOUT PREJUDICE OF ANY CLAIM OR ISSUE BEFORE THE COURT. THE JUDGMENT DISPOSED OF ALL ISSUES AND PARTIES BEFORE THE COURT. THE ADDITION OF THE WORDS "AS PRESENTLY PLED" NEITHER DETRACTED FROM NOR ADDED TO THE EFFECT OF THE JUDGMENT. ANY LANGUAGE CONTRARY TO THE LAWS OF THE STATE IS MERE SURPLUSAGE AND OF NO EFFECT. STATE V. STARLEY, 413 S.W.2D 451 (TEX. CIV. APP. -

CORPUS CHRISTI, 1957, NO WRIT). WE DO NOT BELIEVE THAT NORTH EAST INDEPENDENT SCHOOL DISTRICT V. ALDRIDGE, 400 S.W.2D 893 (TEX. 1966), CITED BY APPELLEES FOR THE PROPOSITION THAT THERE IS A PRESUMPTION THE COURT INTENDED BY ITS JUDGMENT ON THE MERITS TO DISPOSE OF ALL PARTIES BEFORE IT AND ALL ISSUES RAISED BY THE PLEADINGS IS DISPOSITIVE OF THE QUESTION HERE. THE QUESTION IN THE NORTH EAST INDEPENDENT SCHOOL DISTRICT CASE WAS WHETHER IT WAS A FINAL APPEALABLE JUDGMENT WHERE IT DID NOT MENTION DISPOSITION OF A PENDING CROSS-ACTION IN THE CASE. THE RULE AS ENUNCIATED IN THAT CASE IS THAT FOR APPEAL PURPOSES A JUDGMENT IN A TRIAL ON THE MERITS IS PRESUMED TO HAVE DISPOSED OF ALL ISSUES AND PARTIES BEFORE THE COURT AND IS A FINAL APPEALABLE JUDGMENT. THE SAME PRESUMPTION DOES NOT APPLY TO A SUMMARY JUDGMENT, HOWEVER, FOR APPEAL PURPOSES. CARL SCHLIPF, ET AL V. EXXON CORP. ET AL, 626 S.W.2D 74 (TEX. 1982). NEITHER OF THOSE CASES, HOWEVER, IS IN POINT. IN OUR CASE, THERE IS NO DOUBT BUT THAT THE FIRST JUDGMENT IN THE UPCHURCH, TRUSTEE, SUIT WAS A FINAL JUDGMENT AND DISPOSED OF ALL ISSUES AND PARTIES BEFORE THE COURT. IT WAS A FINAL AND APPEALABLE JUDGMENT. THE QUESTION IN OUR CASE IS DID IT HAVE THE EFFECT OF PRECLUDING ADDITIONAL ISSUES IN A LATER SUIT WHICH

COULD HAVE BEEN RAISED AND DECIDED IN THE FIRST CASE, BUT WERE NOT.

AGAIN, WE BELIEVE THIS CASE FALLS WITHIN THE APPLICATION OF THE DOCTRINE OF RES JUDICATA IN SCOPE AS APPLIED IN TEXAS WATER RIGHTS COMMISSION V. CROW IRON WORKS, 582 S.W.2D 768 (TEX. 1979); ABBOTT LABORATORIES V. GRAVIS, 470 S.W.2D 639 (TEX. 1971); FREEMAN V. MCANINCH, 87 TEX. 132, 27 S.W. 97 (TEX. 1894); AND OGLETREE V. CRATES, 363 S.W.2D 431 (TEX. 1963). IN THOSE CASES, AND OUR CASE, WE BELIEVE THE SCOPE OF RES JUDICATA IS NOT LIMITED TO MATTERS ACTUALLY LITIGATED. THE JUDGMENT IN THE FIRST SUIT PRECLUDES THE SECOND ACTION BY THE PARTIES AND THEIR PRIVIES NOT ONLY ON MATTERS ACTUALLY LITIGATED, BUT ALSO ON CAUSES OF ACTION OR DEFENSES WHICH ARISE OUT OF THE SAME SUBJECT MATTER AND WHICH MIGHT HAVE BEEN LITIGATED IN THE FIRST SUIT. BECAUSE WE HOLD THE SUMMARY JUDGMENT WAS PROPERLY GRANTED ON THE APPLICATION OF THE DOCTRINE OF RES JUDICATA, WE DO NOT PASS ON APPELLANTS' OTHER POINTS OF ERROR.

THE JUDGMENT IS AFFIRMED.

/S/ CHARLES PRICE
ASSOCIATE JUSTICE

JUDGMENT RENDERED AND OPINION FILED AUGUST 5, 1982.

PANEL CONSISTS OF CHIEF JUSTICE J. CURTISS BROWN AND ASSOCIATE JUSTICES JUNELL AND PRICE.

THE SUPREME COURT OF TEXAS

JUNE 15, 1983

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RE: NO. C-1626, JOHN H. GRIMM, M.D., ET AL V. FRED RITK ET AL.

DEAR ATTORNEYS:

THE APPLICATION FOR WRIT OF ERROR IN THE ABOVE REFERENCED CASE WAS THIS DAY REFUSED WITH THE NOTATION, NO REVERSIBLE ERROR.

VERY TRULY YOURS,

GARSON R. JACKSON, CLERK

BY_____
FRITZI BORN, DEPUTY

THE SUPREME COURT OF TEXAS

JULY 20, 1983

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RE: NO. C-1626, JOHN H. GRIMM, M.D. ET AL v.
FRED RIZK ET AL

DEAR ATTORNEYS:

THE MOTION FOR REHEARING IN THE ABOVE REFERENCED CASE WAS THIS DAY OVERRULED.

VERY TRULY YOURS,

GARSON R. JACKSON, CLERK

BY_____
FRITZI HORN, DEPUTY

NO. 1,108,668

WILLIAM R. UPCHURCH, TRUSTEE	§	IN THE DISTRICT COURT OF
	§	
V.	§	HARRIS COUNTY, T E X A S
	§	
FRED RIZK, EDWARD RIZK, AND CARL GROMATZKY	§	129TH JUDICIAL DISTRICT

JUDGMENT

BE IT REMEMBERED THAT ON THE 2ND DAY OF MAY, 1977, CAME ON FOR CONSIDERATION DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS CAUSE, AND THE COURT HAVING CONSIDERED THE PLEADINGS ON FILE IN THIS CASE, IN WHICH PLAINTIFF ASSERTS THAT HE IS ENTITLED TO HAVE THE SALE UNDER A DEED OF TRUST OF THE PROPERTY DESCRIBED ON THE ATTACHED EXHIBIT "A" SET ASIDE, AND THE AFFIDAVITS AND ARGUMENTS OF COUNSEL, BEING OF THE OPINION THAT PLAINTIFF WAS NOT ENTITLED TO NOTICE OF THE SALE UNDER THE DEED OF TRUST IN QUESTION, AND, ACCORDINGLY, SHOULD TAKE NOTHING IN THIS CAUSE, AS PRESENTLY PLED (HAND INSERTED BY THOMAS STOVALL, JUDGE PRESIDING), IT IS, THEREFORE,

ORDERED, ADJUDGED, AND DECREED THAT PLAINTIFF TAKE NOTHING IN THIS CAUSE, AS PRESENTLY PLED (HAND INSERTED BY THOMAS STOVALL, JUDGE PRESIDING), AND IT IS FURTHER

ORDERED, ADJUDGED, AND DECREED ALL COSTS INCURRED IN THIS CAUSE BE TAXED AGAINST PLAINTIFF.

SIGNED AND ENTERED THIS THE 2ND DAY OF MAY, 1977.

_____

DISTRICT JUDGE

NO. 83-815

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN H. GRIMM, M.D., PAT McBRIDE, FRANK T. NAGLE, TRUSTEE, AND THE TAYLOR TRUST,
Petitioners,

v.

FRED RIZK, EDWARD RIZK, CARL GROMATZKY, AND FRANK F. DAVIS,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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December 12, 1983

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

1. Did the Texas Court of Appeals err in holding on the basis of the uncontroverted evidence before it that the summary judgment granted by the trial court against Petitioners and others should be affirmed on the ground that a prior final judgment in a previous suit was, under Texas law, *res judicata* of the claims asserted in this suit?

2. If so, is a Texas statute [article 3810, TEX. REV. CIV. STAT. ANN. (Vernon Supp. 1981)] that provided an alternative basis for summary judgment in the trial court subject to constitutional attack in this Court, under the record in this case, where the constitutional claim was not presented to the trial court or the Court of Appeals and no record evidence or decided authority is cited to this Court by Petitioners in support of their attack upon it?

3. If so, is article 3810, TEX. REV. CIV. STAT. ANN. (Vernon Supp. 1981), on its face, in violation of the Constitution?

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NO. 83-815

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN H. GRIMM, M.D., PAT McBRIDE, FRANK T. NAGLE, TRUSTEE, AND THE TAYLOR TRUST,
Petitioners,

v.

FRED RIZK, EDWARD RIZK, CARL GROMATZKY, AND FRANK F. DAVIS,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Fred Rizk, Edward Rizk, Carl Gromatzky, and Frank F. Davis, in response to the petition for certiorari filed by John H. Grimm, Pat McBride, Frank Nagle, Trustee, and The Taylor Trust would show that the petition for certiorari should be dismissed or that certiorari should be denied.

JURISDICTION

This Court is without jurisdiction pursuant to the provisions of 28 U.S.C. § 1257(3) (1977) under which

Petitioners have attempted to invoke its jurisdiction. The validity of a state statute was not placed in issue before any of the courts below and is mentioned for the first time in the petition for certiorari. Thus, as noted at pages 10-11, *infra*, this Court has repeatedly held that it has no jurisdiction to consider the second question presented by Petitioners for review. The first question presented by Petitioners for review does not question the validity of a state statute, but questions the constitutional validity of the application of the doctrine of *res judicata*. In response, Respondents would show this Court that 28 U.S.C. § 1257(3) provides no jurisdiction in this Court over such a claim. Further, this claim, which was asserted for the first time in Petitioners' motion for rehearing of the denial of a discretionary writ in the Texas Supreme Court, was not properly presented to the courts below and preserved for their review. Finally, the constitutional question is insubstantial and of no colorable merit as noted at pages 8-9, *infra*. Thus, it cannot form the basis for jurisdiction in this Court. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952).

STATEMENT OF THE CASE

Petitioners' statement of the case omits a number of uncontroverted elements in the record of proceedings in this case. Petitioners John Grimm, Pat McBride, Frank Nagle, Trustee, and The Taylor Trust, were four of the seven parties against whom a summary judgment was entered by the 151st Judicial District Court of Harris County, Texas, on September 28, 1981.[1]

1. The other three parties against whom summary judgment was entered, Janco, Inc., Plantation Ventures, Ltd., and Frank T. Nagle, Individually, did not perfect an appeal of the trial court judgment.

This suit, the second filed by Petitioners, alleged that Respondents (1) had failed to comply with the provisions of TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1981) (hereinafter "article 3810"), which governs sales under a deed of trust, (2) improperly accelerated the payment of a second note secured by the deed of trust, (3) improperly foreclosed a lien on certain personal property, and (4) breached an alleged oral agreement with Petitioners not to foreclose. Respondents moved for summary judgment on the ground that these claims were all foreclosed by a prior final judgment entered on May 2, 1977, by the 129th Judicial District Court of Harris County, Texas, against William R. Upchurch, the admitted trustee, partner, and agent of each of the Petitioners. Further, Respondents presented evidence by affidavit and from the discovery taken in this suit to establish that each of the Petitioners' claims was, as a matter of law, without merit. Although shortly before the hearing on the motion for summary judgment, Petitioners filed a lengthy affidavit, no factual controversy was raised with respect to any material fact before the trial court. Summary judgment was granted by the trial court on September 28, 1981.

Petitioners perfected an appeal to the Texas Court of Civil Appeals at Houston asserting that the question of whether Respondents had complied with article 3810 presented a factual controversy that should not have been resolved by summary judgment. Petitioners also added three new claims that had not been previously presented to the trial court: (1) that Respondents failed to comply with their contractual obligation to one of the Petitioners, (2) that Respondents waived certain contractual rights, and (3) that Respondents were

estopped to assert rights given them under the deed of trust executed by one of the Petitioners. Respondents asserted in the Court of Appeals that the summary judgment should be affirmed on the ground that the earlier judgment by the 129th Judicial District Court was *res judicata* of the claims asserted by Petitioners, since it was uncontroverted that Petitioners were in privity with the plaintiff in that case. Therefore, under the doctrine of *res judicata,* all claims that were asserted or could have been asserted in the prior suit were barred. Further, Respondents urged under the record developed in this case that it was uncontroverted that summary judgment was proper under each of the other grounds submitted in Respondents' motion to the trial court. In reply, Petitioners urged that the earlier judgment by the 129th Judicial District Court was not a final judgment on the merits.

The Court of Appeals held that the prior final judgment of the 129th Judicial District Court was *res judicata* of the claims asserted in this suit by Petitioners and that, even if Petitioners had claims that had not been asserted in the first suit, those claims could have been asserted in the first suit and were therefore barred under the doctrine of *res judicata.* In light of this decision, the Court of Appeals did not find it necessary to consider Respondents' arguments concerning the other reasons why summary judgment was appropriate, including Respondents' position that they had fully complied with the provisions of article 3810.

A motion for rehearing filed by Petitioners was overruled by the Court of Civil Appeals and the Supreme Court of Texas refused to grant a discretionary writ to

review the Court of Civil Appeals' decision. Petitioners then filed a motion for rehearing in the Texas Supreme Court and, for the first time, urged that the application of the doctrine of *res judicata* in this case violated their right to due process of law. The motion for rehearing of the denial of the discretionary writ was denied by the Texas Supreme Court.

In their petition for certiorari, Petitioners renew the argument that application of the doctrine of *res judicata* is a violation of the Constitution of the United States and now assert for the first time that article 3810, TEX. REV. CIV. STAT. ANN., violates the United States Constitution.

REASONS FOR DENYING THE WRIT

1. Application of the Doctrine of *Res Judicata* Does Not Deny a Party Due Process of Law.

The holding of the Texas Court of Appeals was that the prior final judgment against William R. Upchurch by the 129th Judicial District Court from which no appeal was taken was *res judicata* of the claims asserted by Petitioners.[2] The Court of Appeals noted that the Petitioners had admitted that Upchurch acted as the trustee, partner, or agent for each of them and that Upchurch had no individual interest in the causes of action that

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2. The petition for certiorari argues that the 1977 judgment of the 129th Judicial District Court was not a final judgment, but was an order of dismissal without prejudice. The Texas Court of Appeals, applying Texas law, held to the contrary: "In this case, we hold that the claims of [Petitioners] are barred under the doctrine of *res judicata* by reason of a final take-nothing judgment on the merits in an earlier lawsuit. . . ." *Petitioners' Appendix*, at p. 9.

he asserted. The Court held that the final judgment entered against Upchurch Trustee constituted a judgment on the merits of the Petitioners' claims. Further, the Court of Appeals held that if Petitioners had other claims based upon the same set of factual circumstances, those same claims could have been presented in their prior suit and were, under Texas law, barred by the doctrine of *res judicata.* In applying these precepts to the uncontroverted facts before the Court, the Court of Civil Appeals followed a long line of Texas authority to the same effect. *See, e.g., Texas Water Rights Commission v. Crow Iron Works,* 582 S.W.2d 768, 771-72 (Tex. 1979); *Benson v. Wanda Petroleum Co.,* 468 S.W.2d 361, 363 (Tex. 1971); *Ogletree v. Crates,* 363 S.W.2d 431 (Tex. 1963).

The doctrine of *res judicata* as applied by the courts of Texas substantially mirrors the common law doctrine of *res judicata,* which appears to be almost universally recognized. *See, e.g.,* F. James, *Civil Procedure* § 11.9 (1965); *Developments in the Law—Res Judicata,* 65 HARV. L. REV. 818 (1952). This Court has previously had occasion to review and define the doctrine under the common law:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. . . . Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). *See also Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1877). Since, by definition, the doctrine of *res judicata* is that a party has already had his day in court and cannot have a second, any notion that the application of the doctrine denies a party his right to due process of law is without basis. Naturally, Petitioners cite no authority in their petition to this Court to support that proposition.

A review of the history of this case demonstrates that Petitioners' real complaint is that they do not agree with the conclusion of the courts below that the uncontroverted facts establish that they were in privity with William R. Upchurch, the plaintiff in the 1977 suit or with the legal construction of the judgment entered in that case.[3] While Respondents have argued and the courts below have held that Petitioners are in error on both of these points, Respondents respectfully submit that this Court does not sit to resolve such questions concerning the presence of a fact issue in a particular case or the proper construction of a particular judgment under Texas law.

2. Petitioners' Belated Attack on the Constitutional Validity of Article 3810 is Simply Not a Part of This Case.

Petitioners, for the very first time in this case, argue in their petition for certiorari that article 3810 is

3. Petitioners' contention that the Upchurch judgment was not a judgment on the merits amounted to no more than a collateral attack on a prior final judgment. Texas law precludes such an attack. *El Paso Pipe & Supply Co. v. Mountain States Leasing, Inc.*, 617 S.W.2d 189 (Tex. 1981).

unconstitutional. This claim is not found in Petitioners' pleadings in the trial court, in its response to the motion for summary judgment, in its brief in the Court of Appeals, in its petition for writ of error to the Supreme Court of Texas, or in its motion for rehearing of that petition to the Supreme Court. Further, the decision of the Court of Appeals, as noted above, does not rest upon the validity of article 3810, but upon the applicability of the doctrine of *res judicata* to the claims asserted by Petitioners. This Court has repeatedly held that it has no jurisdiction to consider a constitutional attack upon a state statute that was never presented to the state courts to which a petition for certiorari is sought. For example, in *Beck v. Washington,* 369 U.S. 541 (1961), the court held that it had no jurisdiction to consider a constitutional challenge under the equal protection clause to a Washington State statute since the constitutional challenge had never been presented to the trial court, the Washington Court of Appeals, or the Washington Supreme Court. *Id.* at 553. Identical analysis is applicable here. Petitioners' due process challenge to article 3810 was never made to the trial court, the court of appeals, or the Texas Supreme Court. It is presented for the first time in the petition for certiorari and, accordingly, is a question not properly before this Court. *See also Ferguson v. Georgia,* 365 U.S. 570, 572 (1961); *Capital City Dairy Co. v. Ohio,* 183 U.S. 238, 248 (1902).

Further, the question of the constitutional validity of article 3810 would be germane to this case only if it is assumed that (1) the Court of Appeals erroneously applied the doctrine of *res judicata,* (2) Respondents were

entitled to summary judgment on the basis of their alternative claim to the trial court that the uncontroverted evidence established that they had complied with article 3810, and (3) there were some demonstrable infirmity in article 3810 that was of constitutional significance that had been passed upon by the lower courts. In effect, Petitioners' claim that article 3810 is constitutionally infirm is a collateral attack on the final judgment entered in the earlier 1977 lawsuit in which the original judgment against Petitioners was entered and from which no appeal was perfected. Such a collateral attack originating in this Court is unprecedented to the knowledge of Respondents and Petitioners have cited no authority authorizing it in their petition for certiorari.

3. Article 3810, Tex. Rev. Civ. Stat. Ann., On Its Face, Comports With the Concept of Due Process of Law.

Article 3810, which is quoted in the Petition at pp. 9-11, authorizes a non-judicial foreclosure sale in Texas if certain statutory prerequisites are met. The statute provides for notice to the party owing the debt for which the property serves as security, both by posting of the notice in public places and the mailing of a written notice in a properly addressed envelope. Further, the sale is conducted not by an officer of the state or by any state official, but by an independent trustee selected by the parties by contractual agreement. Thus, on its face, there is no deprivation of private property by the action of the state without notice to the owner of the property that would raise any issue of due process of law.

Indeed, in cases in which a record has been developed and a constitutional attack made upon article 3810, the statute has been held to comply with the constitutions of both Texas and the United States. *See, e.g., Barrera v. Security Building and Investment Corp.*, 519 F.2d 1166, 1169-70 (5th Cir. 1975); *Armenta v. Nussbaum*, 519 S.W.2d 673, 677-79 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.). *See also Williamson v. Tucker*, 615 S.W.2d 881, 892 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). Thus, even if this were a case in which a party had properly presented the claim in the courts below, and these courts had ruled upon it, no substantial question concerning the constitutional validity of article 3810 would be legitimately presented for review.

CONCLUSION

For the foregoing reasons, Respondents Fred Rizk, Edward Rizk, Carl Gromatzky, and Frank F. Davis respectfully urge that the Petition for Writ of Certiorari filed in this cause by John H. Grimm, M.D., Pat McBride, Frank T. Nagle, Trustee, and The Taylor Trust be

dismissed or denied and that Respondents be awarded their costs.

Respectfully submitted,

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December 12, 1983

CERTIFICATE OF SERVICE

Pursuant to Sup. Ct. R. 28.5, I have served all parties required to be served with three copies of the foregoing Brief of Respondents in Opposition to Petition for Certiorari by placing the same in the United States mail, with first class postage prepaid and addressed to the following:

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Dated this December 9, 1983.

Joe H. Reynolds

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